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BLEED THROUGH

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1201

FRANK RAGANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals reversing petitioner's first judgment of conviction (Pet. App. A) is reported at 476 F. 2d 410. The opinion of the court of appeals affirming the second judgment of conviction (Pet. App. B) is reported at 520 F. 2d 1191.

JURISDICTION

The judgment of the court of appeals (Pet. App. C) was entered on October 14, 1975, and a petition for rehearing with a suggestion for rehearing *en banc* was denied on January 20, 1976 (Pet. App. D). The petition for a writ of certiorari was filed on February 20, 1976, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction was barred by principles of *res judicata,* collateral estoppel or due process.

2. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

1. On July 14, 1971, petitioner was indicted by a federal grand jury on three counts of income tax evasion and perjury. The first two counts of the indictment charged him with having attempted to evade, on the return filed by him in 1968, the tax due on a portion of the income he had received in 1967 (26 U.S.C. 7201) and with having made false statements on that return (26 U.S.C. 7206(1)). The third count charged him with having made false statements on the return filed by him in 1969, which covered taxable year 1968 (26 U.S.C. 7206(1)). The latter count charged, more specifically, that petitioner had declared falsely on the return filed by him in 1969 that he had sold for $230,022.20 certain shares of stock in Two Seasons, Inc., obtained by him in consideration of a $50,000 promissory note, and that the resulting income of $180,022.20 represented long-term capital gain. The jury acquitted petitioner of the charges contained in the first two counts of the indictment, relating to taxable year 1967, and convicted him on the third count, relating to taxable year 1968. The court of appeals reversed the conviction, however, because of evidentiary errors at the first trial (Pet. App. A).

Prior to the date of the scheduled retrial on Count III, a superseding six-count indictment was returned against petitioner and S. A. Rizzo. The superseding indictment charged that petitioner had conspired with Rizzo to defraud the United States of revenue by agreeing to disguise the payment of a "finder's fee" to petitioner as a stock transaction on which petitioner could claim a long-term

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capital gain, in violation of 18 U.S.C. 371 (Count I). The indictment also charged that petitioner had attempted to evade, on the returns filed by him in 1967 and 1969, the tax due on portions of the income he had received in taxable years 1966 and 1968, and that he had made false statements on those returns, in violation of 26 U.S.C. 7201 and 7206(1) (Counts II-V). The sixth count of the superseding indictment charged that Rizzo had made false statements on the return filed by him in 1970 regarding the Two Seasons stock that he had delivered to petitioner, in violation of 26 U.S.C. 7206(1).[1]

Petitioner moved prior to trial to dismiss the superseding indictment on grounds of double jeopardy and collateral estoppel. The district court denied the motions, finding that the offenses charged in the superseding indictment were not identical to those charged in the first two counts of the original indictment and that no issue of ultimate fact raised by any count of the superseding indictment could be said to have been resolved in petitioner's favor at the first trial (Pet. App. B 25a). Following a jury trial, petitioner was convicted on all five counts of the superseding indictment in which he was named. He was sentenced to concurrent terms of five years' imprisonment on each of Counts I, II and IV (the conspiracy and tax evasion counts) and three years' imprisonment on Counts III and V (the false statement counts). The sentences were suspended, however, and petitioner was placed on probation for three years (Pet. App. B 25a-26a). The court of appeals affirmed (Pet. App. B).

2. The evidence at trial, as summarized by the court of appeals (Pet. App. B 26a-30a), showed that sometime in

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[1]Rizzo's motion to sever the charges against him was granted prior to trial, and the charges were subsequently dismissed for reasons unrelated to the issues raised in the present petition (Pet. App. B 25a n. 3).

1964 or 1965 Rizzo sought petitioner's assistance in obtaining a $5,000,000 loan from the Pension Fund maintained by the International Brotherhood of Teamsters. Assistance of the type requested by Rizzo normally would have entitled petitioner to receive from the recipient of the loan a "finder's fee" equal to five percent of the loan proceeds. Petitioner agreed to assist Rizzo in obtaining the loan and did so in a variety of ways. The Pension Fund formally approved the loan on March 3, 1965.

Shortly before the loan was approved, Two Seasons, Inc., was incorporated under the laws of Florida for the purpose of acquiring, holding and developing real estate. The first meeting of the company was held on the same day the loan application was submitted to the Pension Fund. Rizzo was elected chairman of the board and president of Two Seasons at the meeting, and all 50 shares of the company's stock were issued jointly to Rizzo and his wife.

Two months after the Pension Fund approved the loan, petitioner received from Two Seasons a check for $15,000. The payment was reflected on the company's books as a charge against the "Acquisition Costs" account. Petitioner received a second payment in September 1965, in the amount of $10,000, which was charged on the company's books as a legal expense. From November 1965 through the end of 1967, petitioner received from Two Seasons additional payments in amounts ranging up to $30,000—all of which were recorded on the company's books as loans. But such "loans" were neither secured by promissory notes nor was interest provided for or paid on them. By the end of 1967, petitioner had received from Two Seasons "loans" totalling approximately $90,550—of which $30,000 was transferred during 1967 on the company's books to the "Legal Expense and Land Acquisition Costs" account, leaving a "loan" balance at the end of 1967 of $60,550.

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Almost simultaneously with his receipt of payments from Two Seasons, petitioner began borrowing funds from the County National Bank of North Miami Beach, Florida, and the Central Bank of Tampa, Florida. By September 1967, the balance of petitioner's loan accounts at the Central Bank of Tampa was $43,000. During the same month, Rizzo instructed an employee of Two Seasons to obtain an additional $10,000 loan from the County National Bank, to be guaranteed by Rizzo, with the proceeds paid to petitioner.

On January 3, 1967, Rizzo transferred 20 shares of Two Seasons stock to petitioner in exchange for petitioner's execution of an unsecured, non-interest-bearing demand note in the amount of $50,000. Rizzo ultimately cancelled the note in 1968, although petitioner had not prior to that time made any payments on the note. Also on January 3, 1967, petitioner was elected vice-president of Two Seasons and was named to the company's three-member board of directors.

On March 24, 1967, petitioner retransferred to Rizzo the certificate representing the 20 shares of Two Seasons stock held by him. On November 6, 1967, two certificates—each representing ten shares of Two Seasons stock—were issued to petitioner. Just before retransferring the 20 shares of stock to Rizzo, petitioner applied to the County National Bank for a loan. He valued the 20 shares in that application at $2,288,000—but did not list either the $50,000 demand note held by the Rizzos or any of the "loans" made to him by Two Seasons among his liabilities.

In December 1967, petitioner delivered a certificate representing ten shares of Two Seasons stock—which had been reissued to him approximately one month earlier—to the County National Bank as security for his outstanding loans. At the same time, petitioner instructed the bank to deliver the stock certificate to the person designated

by him at the time the loans were repaid. By the end of 1967, petitioner had received from Two Seasons and from the two banks (in the form of loans) payments totalling about $250,000 (or five percent of the $5,000,000 originally loaned by the Pension Fund).

On January 2, 1968, petitioner and Rizzo executed a shareholders' agreement. The agreement provided that if either the Rizzos or petitioner pledged Two Seasons stock as security for loans, and those loans came into default, the remaining stockholder(s) would have the right to satisfy the obligations, redeem the stock pledged and exercise full rights of ownership over the stock so redeemed. By a handwritten codicil to this agreement, dated January 12, 1968, petitioner assigned his 20 shares of Two Seasons stock to Rizzo in consideration for Rizzo's "assuming the present indebtedness of [petitioner] to the Central * * * Bank of Tampa, Florida, and the County [National] Bank of North Miami Beach, Florida, and also holding [petitioner] harmless and no longer indebted to the said corporation [Two Seasons, Inc.] for loans made by the said corporation to [petitioner] (Pet. App. B 29a)." The codicil did not specifically mention the $50,000 promissory note petitioner had given Rizzo in January 1967, but that note apparently was covered by the codicil.

On April 18, 1968, Rizzo paid $68,000 to the County National Bank in full satisfaction of petitioner's outstanding loans there. He received in return the ten shares that petitioner had pledged as security for such loans. Petitioner retained the certificate representing the other ten shares of Two Seasons stock until August 1968, at which time he delivered the certificate to the Central Bank of Tampa with instructions to deliver it to the person who satisfied his obligations to that bank. Rizzo sent an employee of Two Seasons to the Central Bank on August 20, 1968, with a check for $51,108.12 to satisfy petitioner's

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obligations there and to take possession of the stock certificate. The two ten-share certificates were subsequently cancelled, and a replacement certificate was issued to Rizzo. In September 1968, Rizzo personally assumed petitioner's indebtedness to Two Seasons, thereby relieving petitioner of any further obligation for the "loans" he had received from the company beginning in November 1965.

ARGUMENT

As noted above (see Jurisdiction, *supra*, p. 1), the present petition was not timely filed. The questions raised do not, in any event, merit further review.

1. Petitioner first contends (Pet. 13-16) that his acquittal on Count 1 of the original indictment, charging tax evasion for taxable year 1967, barred his subsequent prosecution for conspiracy, tax evasion and the making of false statements on his returns for taxable years 1966 and 1968. This contention is without merit.

(a) To the extent that petitioner is claiming that principles of *res judicata* embodied in the Double Jeopardy Clause preclude his conviction on the charges contained in the superseding indictment, following his acquittal on Count 1 of the original indictment, such claim depends upon his being able to show that the offenses charged in the superseding indictment are identical to or included within the offense charged in the original Count 1. *E.g.*, *United States* v. *Ewell*, 383 U.S. 116, 124-125; *Green* v. *United States*, 355 U.S. 184. But petitioner properly concedes (Pet. 14) that in a prosecution for tax evasion, each taxable year represents a separate offense. It is similarly settled, as the court of appeals pointed out (Pet. App. B 34a), that "[c]onspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object" (quoting from *Braverman* v. *United States*, 317 U.S. 49, 54).

None of the offenses charged in the superseding indictment is identical to the offenses charged in Counts I and II of the original indictment, and principles of *res judicata* therefore did not bar petitioner's conviction for those offenses following his acquittal on the original Counts I and II—unless, of course, the prosecution of additional offenses was precluded by the "same transaction" test proposed by petitioner (but see discussion, *infra*, pp. 11-13). Indeed, in a prosecution for tax evasion during a particular year, the government must allege and prove that the defendant received income during that taxable year that he subsequently failed to report on his tax return for that year. Had the evidence at petitioner's first trial showed that the income referred to in the indictment was received by petitioner during taxable years 1966 and 1968—rather than during 1967, as charged—that variance would have been fatal to the charge in the original Count I, since it would have failed to establish that he had evaded taxes due for 1967. See, *e.g.*, *United States* v. *House*, 524 F. 2d 1035, 1039-1040 (C.A. 3). The jury was instructed in accordance with these basic principles at both trials (VI Tr. 23-24, 31; XI R. 1627-1628, 1637-1639).[2]

Petitioner's acquittal on the charges contained in Counts I and II of the original indictment thus represented exoneration only on the charge that he had attempted to evade the tax due on income received by him during taxable year 1967. Since petitioner was neither previously acquitted nor previously convicted of the charges contained in the indictment at the second trial, principles of *res judicata* did not bar his trial on those charges.[3]

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[2]"Tr." refers to the transcript of petitioner's second trial. "R." refers to the transcript of the first trial.

[3]The charge in Count V of the superseding indictment was identical to the charge in Count III of the original indictment, on which petitioner was convicted at his first trial. It is settled, of course, that

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(b) Neither do principles of collateral estoppel bar petitioner's conviction on the charges contained in the superseding indictment. Whether a general jury verdict of acquittal provides a basis for overturning a subsequent conviction depends upon "'whether a rational jury could have grounded its [prior] verdict upon an issue other than that which the defendant seeks to foreclose from consideration'" (*Ashe* v. *Swenson*, 397 U.S. 436, 444 (footnote omitted)). The factual premise underlying petitioner's apparent contention that his conviction on the charges contained in the superseding indictment is barred by the doctrine of collateral estoppel is his assertion that he was acquitted at his first trial "of attempting *in any manner* to evade or defeat *any tax* due and owing on the alleged finder's fee" he received from Rizzo (Pet. 13; petitioner's emphasis).

An obvious, and insurmountable, defect in this assertion is that petitioner was convicted at his first trial of having falsely stated on his 1968 return that the proceeds of his sale of Two Seasons stock represented capital gain rather than ordinary income. It is impossible to square this finding with petitioner's characterization of the jury's general verdict on Counts I and II of the original indictment as a finding that he had not attempted "in any manner" to evade or defeat "any tax" due on the finder's fee paid to him by Rizzo.

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where, as here, a defendant succeeds in having his conviction overturned on appeal, he does not enjoy any protection against reprosecution on that charge. *E.g.*, *Forman* v. *United States*, 361 U.S. 416, 425; *United States* v. *Ball*, 163 U.S. 662, 672; see also *United States* v. *Dinitz*, No. 74-928, decided March 8, 1976 (slip op., pp. 9-10 and n. 13). Petitioner's suggestion that his conviction on Count V of the superseding indictment must nevertheless be reversed, because the government characterized the evidence on Count V differently than it originally characterized the evidence on Count III, is discussed, *infra*, pp. 10-11.

As already noted, moreover, the jury's responsibility with respect to the charges in Counts I and II of the original indictment was to determine whether petitioner had attempted to evade in connection with the return filed by him in 1968 the tax due on a portion of the income he received in 1967. Petitioner's acquittal on those charges did not, either expressly or by implication, involve or depend upon a finding that he had not attempted to evade payment of the tax due on income received by him during other taxable years. In fact, had the evidence at the first trial showed that petitioner received the unreported income referred to in Counts I and II of the original indictment during a year or years other than 1967, the jury was obligated to acquit him on those charges.

2. Petitioner also contends (Pet. 17-22) that by successfully appealing his conviction on Count III of the original indictment he "consented" to be retried only under the theory and "factual characterizations" that underlay that conviction. Petitioner bases this contention on *Green* v. *United States*, *supra*, and *Ashe* v. *Swenson*, *supra*. Neither case aids him.

The defendant in *Green* was originally tried on a two-count indictment charging him with arson and first degree murder. The jury found him guilty of arson and second degree murder. Green successfully appealed his conviction and on remand was tried again for first degree murder. Following his conviction on that charge, he again appealed. This Court ultimately reversed the conviction, holding that Green's conviction at his first trial of the lesser included offense of second degree murder, and the jury's silence concerning the charge of first degree murder, operated as an acquittal on the latter charge and, accordingly, that the Double Jeopardy Clause precluded his subsequent reprosecution for first degree murder. Thus, the decision in *Green* stands for the proposition that a

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defendant's conviction on a lesser included offense precludes the defendant's reprosecution on the greater charge implicitly rejected by the jury at the earlier trial. Nothing in *Green* supports petitioner's contention that a defendant who succeeds in having his conviction overturned on appeal may be retried only under the theory and "factual characterizations" that underlay that conviction. Neither does *Green* preclude a defendant's conviction, following the reversal of an earlier conviction, on charges not at issue in the earlier trial—and with respect to which the defendant's guilt or innocence had not previously been resolved.

In *Ashe* v. *Swenson* this Court held that the doctrine of collateral estoppel precluded the State from trying the defendant on a charge of having robbed one of the participants in a poker game after he had been acquitted of having robbed another participant in the game at the same time. While *Ashe* has some relevance to petitioner's first contention, discussed above (pp. 9-10, *supra*), it does not aid him as to this point. As the court of appeals correctly pointed out (Pet. App. B 33a):

> *Ashe* has no applicability in the circumstances of this case to the retrial of the charges in Count 3 [of] the original indictment following the reversal of the prior conviction on that count. What and all that the decision in *Ashe* condemned was the government's retrial of ultimate facts which had previously been decided in a defendant's favor [in *Ashe*, that the defendant had not been one of the robbers]. The case decided nothing respecting the government's right to alter its theory of the evidence in a case at a retrial following reversal of a prior conviction for the same offense.

3. Petitioner next contends (Pet. 22-26) that the "same transaction" test for defining "offenses" under the Double

Jeopardy Clause precluded the government from obtaining, following his first trial, a superseding indictment containing charges in addition to those contained in the original indictment. Petitioner also claims that the "same transaction" test prevented the government from altering its "legal theories" or its characterization of relevant evidence following reversal of his conviction. Petitioner concedes (Pet. 26), however, that this Court has never held that the joinder of all offenses arising from the same transaction or series of related transactions is constitutionally required. Moreover, petitioner's assertion that the "same transaction" test barred any restructuring of his prosecution following the reversal of his earlier conviction represents no more than a restatement of the contention discussed immediately above. For the reasons already noted, the latter assertion is without merit.

In any event, the "same transaction" test—even if accepted by this Court—would not have prevented the government from prosecuting petitioner, following the reversal of his earlier conviction, on the charges contained in the superseding indictment. By its very nature, the "same transaction" test has nothing whatever to do with the permissibility of retrial on additional charges following the reversal of an earlier conviction. The purpose of the "same transaction" test, as discussed by individual members of this Court (*e.g.*, *Ashe* v. *Swenson*, *supra*, 397 U.S. at 453-454 (Brennan, J., concurring)), is to restrict the use of multiple trials on closely-related charges, when the affected governmental interests can be vindicated in a single trial. That purpose is not furthered by barring the return of additional charges following the reversal of an earlier conviction, since in such circumstances it is the reversal of the prior conviction—rather than the government's initial failure to join all related charges

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in a single prosecution—that is the cause of the second or subsequent trial.[4]

4. Petitioner contends further (Pet. 26-27) that the Due Process Clause of the Fifth Amendment precluded his retrial on the charges contained in the superseding indictment because such charges represented an effort by the government to "up[ ] the ante" in a manner forbidden by *Blackledge* v. *Perry*, 417 U.S. 21. Petitioner did not raise this issue in the court of appeals, and he is therefore precluded from doing so here.[5] *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16. The contention is, in any event, without merit.

The respondent in *Blackledge* had been convicted in a county district court of a misdemeanor. He subsequently filed a notice of appeal in the county superior court, pursuant to a state statute permitting persons convicted in district court to obtain a trial *de novo* in superior court. Prior to respondent's appearance for trial in the superior court, however, the prosecutor substituted a felony charge for the original misdemeanor charge. This Court held

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[4]It is at least doubtful, moreover, whether the events put in issue by the superseding indictment were part of the "same transaction." If the "same transaction" test were held to cover events as diverse as those involved here (*e.g.*, a $30,000 payment in April 1966, a $51,000 payment in August 1968, plus additional loans and payments spread over a four-year period), the result would be to require the mandatory joinder of all offenses involving the same or similar parties with generally related purposes. While the latter characteristics support permissive joinder under Rule 8(a) of the Federal Rules of Criminal Procedure, the "same transaction" proposal "obviously contemplates several criminal charges arising from a single episode that is closely circumscribed in time and place" (*United States* v. *Gremillion*, 464 F. 2d 901, 906 (C.A. 5)).

[5]This Court issued its decision in *Blackledge* more than four months before petitioner filed his brief in the court of appeals.

that such substitution was contrary to the Due Process Clause of the Fourteenth Amendment, since there was a realistic possibility that the State was retaliating against respondent for exercising his statutory right to a trial *de novo*—that is, the opportunity to substitute the greater charge for the lesser "pose[d] a realistic likelihood of 'vindictiveness'" (417 U.S. at 27). But the record in the present case clearly shows that, in obtaining a superseding indictment against petitioner, the government was not motivated by vindictiveness. In fact, the government stipulated prior to petitioner's second trial that such trial would constitute a retrial for sentencing purposes, within the meaning of *North Carolina* v. *Pearce*, 395 U.S. 711, and, accordingly, that petitioner would not—if convicted—be sentenced to a term more severe than had been imposed under Count III of the original indictment (Pet. App. B 26a n. 5).[6]

5. Finally, petitioner contends (Pet. 27-28) that the inconsistency between the theory upon which the government based its prosecution at his first trial and the theory advanced at his second trial confirms that the underlying evidence supports two inconsistent and irreconcilable interpretations of the transactions in question, and that the trial court consequently erred in denying his motion for a directed judgment of acquittal. As an attack on the sufficiency of the evidence, this contention is amply refuted by the evidence at trial showing that petitioner and Rizzo engaged in an elaborate series of manipulations designed to conceal the fact that petitioner had re-

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[6]Following his original conviction, petitioner was sentenced to three years' imprisonment, with the first five months and 29 days of the three years to be served in a jail-type institution and the remaining time on probation. Petitioner has not contended, either here or in the court below, that the sentence imposed following his second trial, which is for a longer period but includes no imprisonment (see discussion, *supra*, p. 3), is more severe than the sentence imposed following the first trial.

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ceived from Rizzo an unreported finder's fee of approximately five percent of the proceeds of the loan from the Teamsters' Pension Fund. Moreover, as the court of appeals concluded (Pet. App. B 43a):

> This contention ties back into the primary point discussed, *supra*, the asserted presence of double jeopardy as a result of the superseding indictment and of the shift in the government's theory of the case between trials. Indeed, it amounts when scrutinized to no more than a corollary to the same contention of 'estoppel by argument'.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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